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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES BRITO,

Defendant and Appellant.

E070867

(Super.Ct.No. BAF1601078)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost, Judge.

Affirmed with directions.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Melissa Mandel and Craig H. Russell, Deputy Attorneys General, for Plaintiff and Respondent.

## I. PROCEDURAL HISTORY

A jury convicted defendant and appellant, James Brito, of two counts of rape (Pen. Code, § 261, subd. (a)(2); counts 1 & 4),<sup>1</sup> two counts of oral copulation by force or fear (§ 288a, subd. (c)(2)(A); counts 2 & 5), and two counts of robbery (§ 211; counts 3 & 6). The jury additionally found defendant had personally used a deadly weapon (§§ 12022.3, subd. (a), 1192.7, subd. (c)(23)) in his commission of the counts 1 and 2 offenses and committed the counts 1, 2, 4, and 5 offenses against more than one victim (§ 667.61, subd. (e)(4)). The court thereafter found true allegations defendant had suffered two prior prison terms (§ 667.5, subd. (b)), a prior felony conviction (§ 667, subd. (a)), and a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). The court sentenced defendant to a determinate term of 19 years of imprisonment followed by an indeterminate term of 80 years to life.

## II. DISCUSSION

On appeal, defendant contends the matter should be remanded to the trial court to exercise its newfound discretion pursuant to the recently enacted Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393), to determine whether to strike the prior serious felony conviction enhancement; that the judgment should be modified to award defendant additional days of presentence custody credits; and that the abstract of judgment must be modified to correctly reflect the sentence. The People agree. The judgment is affirmed, and the matter is remanded with directions.

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<sup>1</sup> All future statutory references are to the Penal Code unless otherwise stated.

A. *Section 667, Subdivision (a) Enhancement*

“On September 30, 2018, the Governor signed [S.B. 1393] which, effective January 1, 2019, amends sections 667[, subdivision] (a) and 1385[, subdivision] (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the [previous] versions of these statutes, the court [was] required to impose a five-year consecutive term for ‘any person convicted of a serious felony who previously has been convicted of a serious felony’ (§ 667[, subd.] (a)), and the court ha[d] no discretion ‘to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.’ (§ 1385[, subd.] (b).)” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) “[S.B. 1393] applies retroactively to *all* cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction is not final . . . .” (*Id.* at pp. 971-972, italics added; accord, *People v. Kelly* (2019) 32 Cal.App.5th 1013, 1016.)

Here, the court imposed sentence on May 25, 2018, well before the enactment of SB 1393, when the court was statutorily required to impose a five-year consecutive term for the section 667, subdivision (a) enhancement. Neither of the parties argued the court should or could consider striking the enhancement. The court simply noted: “I will impose the serious prior offense under [section] 667, [s]ubdivision ([a]), of five years . . . .” Thus, because the ameliorative effect of SB 1393 is retroactive to all cases

which are not final and defendant's appeal is not final, the matter must be remanded to the trial court to determine whether to strike the enhancement.

We therefore remand the matter to the trial court with directions to exercise its discretion pursuant to sections 667, subdivision (a), and 1385, as amended by SB 1393, to determine whether to strike the prior serious felony conviction enhancement. Pursuant to section 1385, to strike the enhancement the court must find that such action would be in "furtherance of justice." "[T]he language . . . , 'furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People . . .*" [Citations.]" (*People v. Orin* (1975) 13 Cal.3d 937, 945-946.) If the court determines to strike the enhancement, it "must set forth the reasons for doing so in a minute order. [Citation.]" (*People v. Johnson* (2015) 61 Cal.4th 734, 769.) We express no opinion as to how the court should exercise its discretion on remand.

#### B. *Custody Credits*

Defendant contends the court should have awarded him an additional six days of actual and one day of conduct credit based upon defendant's incarceration between the date of his arrest on August 10, 2016, and his sentencing on May 25, 2018. The People concede that the matter must be remanded to the trial court for a recalculation of defendant's presentence custody credits but contend the court must make a factual determination as to whether defendant's custody on August 10, 2016, is attributable to the instant proceedings. We agree with the People.

“A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered. [Citation.]” (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647; accord, *People v. Chilelli* (2014) 225 Cal.App.4th 581, 591.) Nonetheless, “it is the business of the trial court, and not the appellate court, to determine the credit to which the defendant is entitled by reason of presentence confinement.” (*People v. Montalvo* (1982) 128 Cal.App.3d 57, 62.) “It is the trial court, and not the appellate court, which has the capability of determining the facts from which the credit may be computed. If the court does not have enough facts at the time of sentencing, its duty is to direct ‘the sheriff, probation officer or other appropriate person’ to produce the information. At the time sentence is pronounced, the defendant and his attorney will be present and will have seen what is in the reports submitted to the court on this subject. . . . [A]ny dispute as to the amount of allowable credits shall be resolved at that time.” (*Ibid.*) “[C]redit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.” (§ 2900.5, subd. (b).)

Here, officers in Los Angeles County arrested defendant on August 10, 2016, apparently for a parole violation. The probation report reflects defendant’s date of arrest in the instant matter was August 16, 2016. Thus, it is unclear whether defendant’s initial custody date of August 10, 2016, may be deemed attributable to the proceedings in the instant case. Therefore, the matter is remanded to the trial court to determine defendant’s

period of custody attributable to the instant proceedings and to calculate defendant's custody credits accordingly.

### *C. Abstract of Judgment and Minute Order*

Defendant contends the sentencing minute order and abstract of judgment must be modified to correctly reflect the sentence. The People agree.

“It is well settled that ‘[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]’ [Citation.] When an abstract of judgment does not reflect the actual sentence imposed in the trial judge’s verbal pronouncement, [appellate courts have] the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties. [Citation.]” (*People v. Jones* (2012) 54 Cal.4th 1, 89.) The reviewing court has the authority to correct clerical errors in the minute order. (*People v. Contreras* (2009) 177 Cal.App.4th 1296, 1300, fn. 3.)

The minute order and abstract of judgment reflect the court composed an aggregate sentence on count 1 to include 30 years to life on the count 1 offense itself and a consecutive 20 years for the personal use of a deadly weapon enhancement. However, the court actually imposed a sentence of 25 years to life, doubled pursuant to the prior strike conviction enhancement, for a total of 50 years to life. Similarly, as to count 2, the minute order and abstract of judgment reflect the court imposed a concurrent term of 30 years to life on the count 2 offense itself and a concurrent term of 30 years for the

personal use of a deadly weapon enhancement. However, the court actually imposed a sentence of 25 years to life, doubled to 50 years to life pursuant to the prior strike conviction enhancement. Thus, we shall direct the court to correct the minute order and abstract of judgment.

### III. DISPOSITION

The matter is remanded to the trial court to exercise its discretion pursuant to sections 667, subdivision (a), and 1385, as amended by SB 1393, as to whether to strike the prior serious felony enhancement in accordance with the views expressed herein. We express no opinion as to how the court should exercise its discretion on remand. The court is further directed to redetermine its award of defendant's custody credits in accordance with the views expressed herein. The court is also directed to correct the sentencing minute order and abstract of judgment in accordance with the views expressed herein. Finally, the trial court is directed to forward a copy of the new abstract of judgment and sentencing minute order to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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McKINSTER  
Acting P. J.

We concur:

FIELDS  
J.

RAPHAEL  
J.